Supreme Court, U.S.
FILED

99 32 JUN 30 1999

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

SAMSON BLUE,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. L'ESPERANCE
Counsel for Petitioner
609 Richmond Drive, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

QUESTION PRESENTED

Whether the New Mexico State Court of Appeals erred by reversing the District Court's quashing of Defendant's Indictment for failure of the Prosecutor to present the exculpatory portions of the polygraph report, including Defendant's statement, to the Grand Jury?

PARTIES TO THE PROCEEDING

SAMSON BLUE, Petitioner and Defendant below

and

THE STATE OF NEW MEXICO

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinion Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Writ 2

Conclusion 6

Appendix A 1a

Appendix B 10a

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Bank of Nova Scotia v. U.S., 487 U.S. 250, 101 L.Ed.2d 228, 108 S.Ct. 2369 (1988) 5

Berger v. U.S., 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935) 4

Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) 5

U.S. v. Agurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976) 5

U.S. v. Williams, 504 U.S. 36, 118 L.Ed.2d 352, 112 S.Ct. 1735 (1992) 3

Wood v. Georgia, 370 U.S. 375 8 L.Ed.2d 569, 82 S.Ct. 1364 (1962) 3

STATE CASES:

Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981) 3

New Mexico v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975) 4

State v. Blue, 1998-NMCA-135, 125 N.M. 826, 965 P.2d 945 2

State v. Hewitt, 108 N.M. 179, 769 P.2d 92 (Ct. App. 1988) 5

OTHER AUTHORITIES:

Section 31-6-11, N.M.S.A. 1978 4

SCRA 11-707 (1986) 4

COM[illegible] NOW appellate counsel for Defendant Samson Blue, Petitioner herein, seeking a Writ of Certiorari to review the Opinion of the New Mexico Court of Appeals regarding the duty of the prosecution to disclose known exculpatory evidence to the Grand Jury.

OPINION BELOW

The Opinion appears as Appendix A, and is published as 1998-NMCA-135, 125 N.M. 826, 965 P.2d 945.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257: criminal proceeding on direct appeal from the Supreme Court, State of New Mexico. Order appears as Appendix B.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, U.S. CONSTITUTION:

"No person shall be . . . deprived of . . . liberty . . . without due process of law . . .

FOURTEENTH AMENDMENT, U.S. CONSTITUTION:

". . . No State shall . . . deprive any person of . . . liberty . . . without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Samson Blue, a former police officer, took a polygraph several days prior to the presentation of this case to the grand Jury. He passed the polygraph with flying colors and requested that the Prosecutor present the tapes, charts, graphs and records to the Grand Jury. New Mexico has statutes and caselaw providing for this procedure.

The Prosecutor had a police officer read only parts of the report to the Grand Jury. No evidence was submitted

regarding Defendant's statement or his significantly positive score.

The trial court quashed the ensuing indictment on grounds "that the State's failure to present the entire report on the polygraph of Defendant to the grand jury requires the case to be resubmitted to the grand jury with presentation of the evidence."

Rather than resubmit the case to the Grand Jury, the State appealed.

The New Mexico Court of Appeals reversed the trial court by Opinion (Appendix A). The New Mexico Supreme Court granted a Writ of Certiorari to review this Opinion, but after briefing quashed the Writ on April 1, 1999. (Appendix B)

REASONS FOR GRANTING THE WRIT

The Prosecutor, and thereafter the State, has engage in "artful deception."

The polygrapher involved, Mr. Jim Wilson, is a former law enforcement officer, known to all persons involved in criminal litigation in New Mexico as a prosecution-oriented, but highly respected, professional. He has testified in thousands of cases, and his interpretation of the test in this case was "off the chart" in favor of the Defendant. To say that this is not exculpatory evidence is prosecutorial misconduct, *per se*.

This Petition is not about Grand Juries or polygraphs, but concerns the fair presentation of evidence by an officer of the court.

In New Mexico, a Prosecutor must present to the Grand Jury evidence that directly negates the guilt of the target

where he is aware of such evidence. Section 31-6-11(b), N.M.S.A. 1978. *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981). This goes beyond the holding in *U.S. v. Williams*, 504 U.S. 36, 118 L.Ed.2d 352, 112 S.Ct. 1735 (1992), that there is no constitutional duty to present exculpatory evidence to federal grand juries.

As this Court states in *Williams*, *supra.*, Grand Juries determine probable cause. But many jurisdictions, including New Mexico, have affirmatively stated that in presenting evidence of such probable cause, the Prosecutor may not deceive the Grand Jury or present its evidence in a manner that is essentially telling the Grand Jury a "half truth." This is what occurred here.

The report states:

". . . Mr. Blue's polygraph records were scored at plus 19. That score is more than three times the minimum required at the diagnostic decision threshold and is consistent with truthfulness.

"In addition, I used scoring software developed by the Applied Physics Laboratory of Johns Hopkins University, PloyScore™, to evaluate the physiological records. That program rated them as 'Strongly NDI' (no deception indicated) and computed the probability that Mr. Blue answered the relevant questions deceptively at less than .01 (one percent)."

Mr. Blue's own lengthy statement, included in this report, affirmatively disclaims any criminality. It was not read or presented to the Grand Jury.

The primary duty of the Grand Jury is to protect the innocent from oppressive prosecution. *Wood v. Georgia*, 370 U.S. 375, 8 L.Ed.2d 569, 82 S.Ct. 1364 (1962).

In New Mexico, the legislature requires the prosecuting attorney to "present evidence that directly negates the guilt of the target where he is aware of such evidence." And the failure to do so is subject to review for bad faith. Section 31-60-11, N.M.S.A. 1978.

In New Mexico, polygraph evidence has been admissible since at least 1975: *New Mexico v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). Supreme Court Rules (Evidence) Anno. (SCRA) 11-707.

In this case, despite the Court of Appeals' assertions to the contrary, there was a determination by the trial court that the polygraph evidence was admissible, that Jim Wilson was a competent polygrapher, and that these tests were performed in accordance with Rule 11-707, *supra*.

More importantly, the report contained Defendant's statement, in his own words, which should have been presented.

"The prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' Thus, 'while he may strike hard blows, he is not at liberty to strike a foul one.'" *Berger v. U.S.*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629,633 (1935).

The Court of Appeals' Opinion stands or falls on the concept of "direct evidence." But the Grand Jury here would not have to infer anything. Defendant's statement is direct evidence. The State should have presented the entire report on the polygraph, including his statement, to the Grand Jury.

Here, Defendant provided the prosecutor with the polygrapher's report, the Defendant's story, and all the charts and graphs which make the test admissible under SCRA 11-707.

New Mexico follows the majority rule that not all exculpatory evidence need be presented to the Grand Jury. In a preliminary finding in this case, the same Court of Appeals previously stated:

"Here, the evidence alleged to be directly exculpatory was the entire report . . . The jury was also read a portion of a letter . . . summarizing Defendant's version of the events . . . While it is true that a prosecutor 'is invested with wide discretion as to the selection and presentation of evidence' to the grand jury, evidence that negates the allegations against the accused must be presented." *State v. Hewitt*, 108 N.M. 179,183, 769 P.2d 92 (Ct.App. 1988).

Having established these procedures by statute and rule, the State must prevent error which is not harmless. *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 101 L.Ed.2d 228, 108 S.Ct. 2369 (1988). The Court must test the materiality of whether the omitted evidence creates a reasonable doubt as to the Defendant's guilt that does not otherwise exist. *U.S. v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976). This is what the trier of fact, quashing the indictment, found.

While New Mexico's standard is "bad faith," this Court has held that suppression of evidence favorable to the Defendant on his request violates due process where that evidence is material to guilt, irrespective of bad faith, adopting a concept of fairness, rather than dwelling on prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Under any objective test, a polygraph score of plus 19 and the Defendant's own words, where credibility is the only issue (there was no physical evidence), are the most clearly exculpatory forms of evidence.

It is the minimization of this exculpatory evidence that turns the process from one for the search for truth to one in which a prosecutor will always be able to "indict a ham sandwich." This denies defendants due process.

CONCLUSION

Having agreed that Defendant has a due process right to have exculpatory evidence presented to the Grand Jury, the New Mexico legislature and its courts have made the Fifth Amendment apply in this case. The Writ should issue; the New Mexico Court of Appeals' Opinion should be reversed and the District Court's Order reinstated.

Respectfully submitted,

WILLIAM A. L'ESPERANCE
Counsel for Petitioner
609 Richmond Drive, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Docket No. 18,637

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

SAMSON BLUE,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
George A. Harrison, District Judge

FILED
98 AUG 14 AM 9:59
COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

OPINION

APODACA, Judge.

This is an appeal by the State from the district court's dismissal of an indictment against Defendant. The district court dismissed the indictment because of the prosecutor's failure to present additional evidence of Defendant's

polygraph test to the grand jury as direct exculpatory evidence. The State argues that dismissal was error. We agree and reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

The grand jury indicted defendant for criminal sexual penetration by force or coercion and kidnapping of the victim. See NMSA 1978, §§ 30-90-11(C)(2) (1995), 30-4-1(A)(3) (1995). At the grand jury proceeding, the prosecutor presented some evidence that Defendant took and passed a polygraph test and that the victim's polygraph score was inconclusive. The prosecutor, however, did not present evidence of the polygrapher's interview of Defendant, the written report of Defendant's polygraph, or the polygrapher's explanation of the test and of Defendant's score.

Defendant filed a motion to quash the indictment because of the prosecutor's failure to present exculpatory evidence regarding Defendant's polygraph test. *See* NMSA 1978, § 31-6-11(B)(1981) (stating that prosecutor shall provide exculpatory evidence to the grand jury). The district court initially denied the motion, and Defendant filed a motion to reconsider. On reconsideration, the district court quashed the indictment under the authority of *State v. Hewitt*, 108 N.M. 179, 182, 769 P.2d 92, 95 (Ct. App. 1988).

Hewitt requires a defendant to satisfy a three-prong test to obtain dismissal of an indictment because of the state's failure to present exculpatory evidence to the grand jury. First a defendant must "establish demonstrable prejudice resulting from the acts or omissions of the prosecutor." *Id.* Second, the evidence the prosecutor failed to present must directly negate the defendant's guilt. Third, the evidence must be legally admissible at trial. *Id.* In this appeal, the State argues that Defendant's proferred evidence does not

satisfy the *Hewitt* test. We discuss all three prongs of the test to clarify the law under each prong, even though Defendant's failure to satisfy any *one* of the prongs is fatal to a dismissal of the indictment.

II. DISCUSSION

A. Standard of Review

The district court's dismissal of the indictment presents a matter of law reviewed de novo on appeal. *See State v. Armijo*, 118 NM 802, 811, 887 P.2d 1269, 1278 (Ct. App. 1994)(district court's dismissal of an indictment due to prosecutor's alleged failure to present exculpatory information to grand jury is reviewed de novo).

B. Prejudice

Under the first prong of the *Hewitt* test, Defendant must show that the prosecutor's conduct infringed on the grand jurors' independent judgment and the result would have been different had the conduct not occurred. *See Hewitt*, 108 N.M. at 184, 769 P.2d at 97. Defendant did not meet this burden. Defendant has not argued on appeal how the result would have differed in the absence of the prosecutor's conduct.

In fact, the grand jury was specifically informed that Defendant had passed the polygraph; telling the grand jury Defendant's exact score would not have accomplished much more in the context of a probable cause determination. *See State v. Penner*, 100 N.M. 377, 379, 671 P.2d 38, 40 (Ct. App. 1983) (holding that prejudice needed to be shown is that the missing evidence would have changed the vote on probable cause). Additionally, the grand jury did not have questions about the victim's "inconclusive" score and how that score compared to Defendant's passing score. The detective also informed the grand jury about Defendant's version of the

events. Thus, Defendant's version that he knew the alleged victim and that he engaged in consensual sex with her was presented to and considered by the grand jury.

Consequently, we hold that failure to present the polygrapher's interview of Defendant, Defendant's polygraph report, and explanation of his test and score did not prejudice Defendant.

Because Defendant was not prejudiced by the prosecutor's failure to present the evidence to the grand jury, Defendant has failed to meet the first *Hewitt* prong, and thus we hold that there was no due process violation. *See Buzbee v. Donnelly*, 96 N.M. 692, 702-06, 634 P.2d 1244, 1254-58 (1981) (implying that due process analysis for the withholding of evidence should consider effect on grand jury and prejudice to the defendant).

C. Direct Negation of Defendant's Guilt

The second prong of the *Hewitt* test requires Defendant to demonstrate that the omitted evidence directly negated his guilt. *See id.* at 182, 769 P.2d at 95. "Direct evidence is evidence which, if believed, proves the existence of the fact without inference or presumption." *Buzbee*, 96 N.M. at 700, 634 P.2d at 1252. We hold that Defendant's proferred evidence was not directly exculpatory.

The polygraph evidence would not prove the existence of a fact without inference or presumption. This Court in *State v. Anthony*, 100 N.M. 735, 737 n. 2, 676 P.2d 262, 264 n. 2 (Ct. App. 1983), explained:

> A polygraph machine is a device [that] measures and records the changes in the examinee's blood pressure or pulse rate, respiration rate and depth, and galvanic skin resistance while undergoing

> questioning. The theory underlying the use of such devices is that if an individual consciously responds untruthfully to questioning, the machine will detect physiological indications revealing a deceptive answer.

Consequently, the grand jury would have to infer from Defendant's physiological reactions that he was probably telling the truth.

Additionally, polygrapher's letter acknowledges that his opinion was based on inferences:

> Inferences about whether a person is being truthful or deceptive in answering the relevant questions are justified only when the person consistently produces autonomic physiological responses that are stronger to either control or relevant questions.

To negate Defendant's guilt, the grand jury would have to presume that Defendant's honest perception of the events was the objective truth.

The grand jury would also have to assume that Defendant did not take countermeasures against the polygraph.

"[A]mong the factors that can adversely affect the reliability of the polygraph test are the emotional upset of the subject, fatigue, drunkenness, drugs, bad physical or emotional condition, high blood pressure, low blood pressure, hardening of the arteries, obesity, feeble-mindedness, amnesia, a psychotic condition, being a pathologic liar, lack of fear or concern at being caught in a lie, surreptitious nervous simulation, use of antiperspirants, hypnosis, extraneous noise or abnormal temperatures."

Anthony, 100 N.M at 738, 676 P.2d at 265 (quoting *People v. Berry*, 173 Cal. Rptr. 137, 143 (Cal. Ct. App. 1981)).

According to polygraph experts, a subject's state of mind and physical condition can alter the responses measured by the polygraph. *See Anthony*, 100 N.M. at 738, 676 P.2d at 265.

Defendant relies on language in *Hewitt*, 108 N.M. at 183, 769 p.2d at 96, to support his argument. This Court in *Hewitt* stated: "With the exception of the polygraph test results, there was no factual basis for the court's determination that the matters referred to by Hewitt in his letter were in fact directly exculpatory." *Id.* We interpret this language to mean that the only evidence before the trial court at the motion hearing was the polygraph evidence. *See id.* At 182-83, 769 P.2d at 95-96. *Hewitt* did not analyze whether the polygraph results were direct evidence. Rather, our Curt focused on the inadmissibility of the evidence under the third prong. *See id.* At 183, 769 P.2d at 96. We thus conclude that Defendant's citation of *Hewitt*, 108 N.M. at 183, 769 P.2d at 96, does not determine the issue of direct evidence.

D. Admissibility

The final prong of the *Hewitt* test requires Defendant to prove that the evidence would be legally admissible at trial. *See id.* At 182, 769 P.2d at 95. Rule 11-707 NMRA 1998 provides the standards for the admissibility of polygraph evidence:

> **B. Minimum qualifications of polygraph examiner.** To be qualified as an expert witness on the truthfulness of a witness, a polygraph examiner must have at least the following minimum qualifications:
>
> > (1) At least five (5) years' experience in administration of interpretation of polygraph examinations or equivalent academic training;

(2) Conducted or reviewed the examination in accordance with the provisions of this rule; and

(3) Successfully completed at least twenty (20) hours of continuing education in the field of polygraph examinations during the twelve (12) month period immediately prior to the date of the examination.

C. Admissibility of results. Subject to the provisions of these rules, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

(1) the polygraph examination was conducted in accordance with the provisions of this rule;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;

(3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee's background, health, education and other relevant information;

(4) at least two (2) relevant questions were asked during the examination; and

(5) at least three (3) charts were taken of the examinee.

D. Notice of examination. Any party who intends to use polygraph evidence at trial, shall not less than thirty (30) days before trial or such other time as the district court may direct, serve upon the opposing party a written notice of such party's intention to use such evidence. The following reports shall be served with the notice:

(1) a copy of the polygraph examiner's report, if;

(2) a copy of each chart;

(3) a copy of the audio or video recording of the pretest interview, actual testing and pretest interview; and

(4) a list of any prior polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, the dates and the results of the examinations.

See also Anthony, 100 N.M. at 737-38, 676 P.2d at 264-65.

We hold that Defendant failed to satisfy these requirements. Defendant made no showing that the examiner could qualify as an expert polygraph witness at trial. Nor did Defendant develop proof of the accuracy of the results of the polygraph witness at trial. Nor did Defendant develop proof of the accuracy of the results of the polygraph examination. *See Hewitt*, 108 N.M at 183, 769 P.2d at 96. As a result, Defendant also failed to satisfy the third prong under *Hewitt*. *See id.* at 182, 769 P. 2d at 95.

III. CONCLUSION

In summary, we conclude that the trial court improperly dismissed the indictment against Defendant. We hold that Defendant failed to show that: (1) omission of his proferred evidence was prejudicial, (2) the evidence directly negated his guilt, and (3) the evidence would be legally admissible at trial. We therefore reverse the district court's order and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

WE CONCUR:

/s/ Lynn Pickard
LYNN PICKARD, Judge

/s/ Richard C. Bosson
RICHARD C. BOSSON, Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 1, 1999

NO. 25,352

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

SAMSON BLUE,

Defendant-Petitioner.

ORDER

WHEREAS, this matter came on for consideration upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised, issued its writ of certiorari on September 28, 1998, and, after further consideration of the petition and briefs filed therein, the judgment of the Court is that the writ shall be quashed, Chief Justice Pamela B. Minzner, Senior Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari issued on September 28, 198, hereby is QUASHED.

WITNESS, The Hon. Pamela B. Minzner, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 1st day of April, 1999.

(SEAL)

/s/ Kathleen Jo Gibson

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

ATTEST: A TRUE COPY
/s/ Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico